SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, ET AL.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

LEE PRESSMAN,
JOSEPH KOVNER,
ANTHONY WAYNE SMITH,
Counsel for Appellants.

MAX E. GELINE,
Of Counsel.

INDEX.

Subject Index.

Table of Cases Cited.

STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, FRED WOLTER, ESTHER KUSMIEREK, ESTHER GREENEMEIER, SOPHIE KOSCIERSKI, FRANCES CHANDEK, AGNES TANKO, HARRY ROSE, DAN ROKNICH, TONY CALABRESA, EDWARD OKULSKI, PETER BLAZEK, EILIF TOMTE, EDWARD LARSON AND MIKE DEMSKI,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY, A WISCONSIN CORPORATION,

Appellees.

STATEMENT AS TO JURISDICTION.

The appellants herewith submit their statement, pursuant to Rule 12 of this Court, showing that the appeal in the above-entitled cause is properly before this Court.

Opinions Below.

The Circuit Court issued two opinions, one upon the enforcement of the interlocutory order of the Wisconsin Employment Relations Board, dated December 14th, 1939 (C. 60, R. 111). The second opinion of the Circuit Court,

dated July 16th, 1940, was issued upon the enforcement of the final order of the Wisconsin Employment Relations Board (C. 53, R. 61). Copies of each of these opinions are appended to the statement and marked Exhibits A and B, respectively. The opinion of the Wisconsin Supreme Court is reported in 237 Wis. 164, 295 N. W. 791, and is appended hereto and marked Exhibit C.

Jurisdiction.

1) Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13th, 1925, January 31st, 1928, and April 26th, 1928.

2) State Statute Drawn Into Question and Decision in Favor of Its Validity.

The statute involved in this case is the Wisconsin Employment Peace Act (C. 57 Laws of 1939, Wisc. Stat. (1939) c. 111, pp. 1610-18). This statute is a general public law seeking to regulate the subject of rights and duties of employers and employees and labor organizations in businesses engaged in interstate commerce and intrastate commerce, with reference to matters of the self-organization of employees for purposes of collective bargaining, and collective bargaining between employers and employees. The appellants have drawn into question the entire Act on the ground that in its entirety it is repugnant to the commerce clause of the Federal Constitution and the National Labor Relations Act.

Among other matters, the Wisconsin Employment Peace Act defines the employee status and sets forth unfair labor practices for employers, employees, and labor organizations, including employers and employees and labor organizations subject to the National Labor Relations Act.

Section 111.02, Subsection (3) of said Wisconsin Act defines an employee as follows:

> "111.02 Definitions. When used in this chapter: (3) The term 'Employee' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin, in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and * * * who has not been found to have committed or to have been a party to any unfair labor practice hereunder."

Under and pursuant to section 111.02, subsection (3) (b), employee strikers who have been found to have committed, or to have been a party to, any unfair labor practices lose their status as employees for the purposes of the Act. The unfair labor practices therein referred to, and particularly relevant here, are contained in section 111.06, subsection (2), and are as follows:

> "2. It shall be an unfair labor practice for an employee individually or in concert with others:
>
> a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04 or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.
>
> * * * * * * *
>
> e) To cooperate in engaging in, promoting or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

• • • • • • •

j) To commit any crime or misdemeanor in connection with any controversy as to employment relations."

In addition to the foregoing sections, the appellants particularly challenge Section 111.01 relating to the public policy of the Wisconsin Act; Section 111.02 (6) setting forth the definition of an appropriate bargaining unit; Section 111.02 (8) setting forth the definition of a labor dispute; Section 111.04 setting forth the rights of employees; Section 111.06 (1) setting forth the unfair labor practices of employers; and Section 111.06 (3) relating to the unfair labor practices of unions.

3) Finality of Judgment.

The judgment forming the basis of the appeal herein is final both in form and in substance, and disposes of all of the elements of the controversy in the court below. The judgment confirms the validity of the Wisconsin Employment Peace Act on its face and as applied to the appellants and affirms the final judgment of the Circuit Court of Milwaukee County, enforcing the final Order of the Wisconsin Board.

4) Appeal Timely Taken.

The judgment from which this appeal is taken was entered on January 7th, 1941. On January 21st, 1941, the petitioners filed a motion for rehearing. On March 11th, 1941, the Supreme Court of the State of Wisconsin denied said mo-

tion for rehearing without opinion. On June 2nd, 1941, the appellants filed with the Wisconsin Supreme Court a petition for appeal accompanied by an assignment of errors and the within "Statement as to Jurisdiction". On June 2nd, 1941, the Honorable Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin, made and entered an Order allowing the within petition to the Supreme Court of the United States.

5) Constitutional Question—Timely and Sufficiently Raised.

The claim that the Wisconsin Employment Peace Act is repugnant to the Constitution and laws of the United States was consistently and frequently raised throughout the entire proceedings herein before the Wisconsin Employment Relations Board in the form of "Objection of Allen-Bradley Union to Jurisdiction of the Wisconsin Employment Relations Board and Motion to Dismiss Complaint" (C. 83, R. 150). This objection and motion was dismissed by the State Board.

The same objection and motion was renewed orally at the outset of the proceedings before the State Board (C. 88, R. 163).

Upon the issuance of the final order by the State Board, the appellants filed a petition for review of its final order and set forth therein, as the major ground for said review, the claim that the State Act was repugnant to the provisions of the National Labor Relations Act, and was therefore void and unconstitutional. The said petition for review set forth in detail the various ways in which the State Act was in conflict with the National Labor Relations Act (C. 2-19, R. 4-19), on its face and as construed and applied to the appellants.

The same claim was made again in the reply of the appellants to the cross petition of the State Board for enforcement of its final order (C. 33-49, 41-55).

The Circuit Court, after expressly considering these constitutional objections, rejected them and upheld the constitutionality of the State Act on its face and as construed and applied to the appellants. Upon appeal to the Wisconsin Supreme Court, the appellants in their brief again set forth the same claims. The Wisconsin Supreme Court denied each of the contentions of the appellants. The motion for rehearing filed after the Wisconsin Supreme Court rendered its decision, set forth once again the claim that the State Act on its face and as construed and applied to the appellants was repugnant to the Constitution and laws of the United States in divers ways.

6). Nature of the Case.

The Allen-Bradley Company is a manufacturer in the City of Milwaukee engaged in producing electrical control equipment. It employs approximately 700 workers. The character of its business is such that it is engaged in interstate commerce and subject to the National Labor Relations Act. The Company at the hearing before the State Board stipulated that it was subject to the National Labor Relations Act (C. 89, R. 164).

On May 6th, 1939, the Appellant Union called a strike at the plant of the Company. The Company filed a complaint with the State Board against the Union and its members, charging them with violating Sections 111.06, Subsection (2), Subsection (3) of the State Act. On February 1st, 1940, the State Board issued its final order wherein it found that the fourteen individual appellants and the Union had committed acts of misconduct in violation of Sections 110.06 (2) (a) (e) (f) and (j) of the State Act, and, as a conclusion of law, ruled that each of the fourteen individual appellants and the Union were guilty of unfair labor practices.

The acts of misconduct of the fourteen individual appellants are set forth in the findings of fact and are unchallenged.

These findings are set forth in the final Order as follows:

"11. That Fred Wolters was, prior to the time of the strike, an employee of the Allen-Bradley Company, and president of the Union, and that by threats, force and coercion of other kinds, he attempted to intimidate and to prevent certain employees of the company who desired to continue their employment therein, from pursuing their lawful work and employment.

12. That Esther Kuzmerck, Esther Greenmeier, Sophie Kozcierski, Frances Chandek and Agnes Tanko, were prior to the time of the strike, employees of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent Ruth Batt, an employee of the Allen-Bradley Company, who desired to continue her employment therein, from pursuing such lawful work and employment, and that the said named persons committed an assault and battery upon the person of said Ruth Batt.

13. That Harry Rose and Dan Roknich were, prior to the time of the strike, employees of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent one Marie Rudella, an employee of the Allen-Bradley Company, who desired to continue her employment therein, from pursuing her lawful work and employment.

14. That Tony Calabreesa and Edward O'Kulski were, prior to the time of the strike, employees of the Allen-Bradley Company, and that by assault, force and coercion, attempted to prevent one Ann Cycosch, who desired to continue her employment with the Allen-Bradley Company, from pursuing her lawful work and employment.

15. That Peter Blazek, prior to the time of the strike an employee of the Allen-Bradley Company, assaulted one Anton Stanwick, an employee of the Allen-Bradley

Company, and by such assault attempted to intimidate said Anton Stanwick and to prevent him from continuing his employment with the Allen-Bradley Company.

16. That Eilif Tompte and Edward Larson, prior to the time of the strike, employees of the Allen-Bradley Company, were arrested and convicted of attempting to damage property belonging to employees of the Allen-Bradley Company, who continued to work for said company during the strike, and that such misdemeanor was committed in connection with the controversy then existing between the company and the Union.

17. That Mike Dembski, prior to the time of the strike an employee of the Allen-Bradley Company, was arrested on the picket line maintained by the Union, armed with concrete rocks, and that said Dembski intended to use such rocks for the purpose of intimidating employees of the company who desired to continue their employment therein, from pursuing such lawful work and employment."

The Board also found that the Union had engaged in the following acts:

"5. That from the beginning of said strike, the Union has engaged in mass picketing at all of the entrances to the factory for the purpose of hindering and preventing the pursuit of lawful work and employment by employees of the Allen-Bradley Company who desired to engage in such lawful work or employment.

6. That after the commencement of said strike, the Union obstructed and interfered with entrance to and egress from the factory of the company, and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory of the company.

7. That the Union, by its officers and many of its members, threatened bodily injury and property damage to many of the employees desiring to continue their employment with the company.

8. That the Union required of persons desiring to enter the factory without interference that they obtain passes from the Union at its strike headquarters.

9. That the Union, by its officers and many of its members, picketed the domiciles of many employees desiring to continue their employment with the company."

On the basis of these findings, the Board ruled that the individual appellants were guilty of unfair labor practices (C. 24, R. 25) and directed the Union and its members to cease and desist from "mass picketing", "threatening employees", "obstructing entrances", "obstructing full use of streets", and "picketing domicile of any employee".

The final Order of the State Board was upheld in full without any modifications by the Wisconsin Supreme Court.

Under Section 111.02 (3) (b) of the State Act, set forth above, striking employees, who are found guilty of unfair labor practices, automatically lost their status as employees for the purposes of the State Act.

Accordingly these individuals, and the Union through which they exercise their rights to collective bargaining, are no longer entitled to the rights of "employees" set forth in Section 111.04 of the State Act. This is the section of the State Act corresponding to Section 7 of the National Labor Relations Act.

They are no longer entitled to the benefits of Section 111.05 of the State Act which provides for the free choice of collective bargaining representatives by "employees". This is the section of the State Act corresponding to Section 9 of the Federal Act.

They are no longer protected from the invasion of the rights of "employees" under Section 111.04 by the unfair labor practices of employers set forth in Section 111.06 (1) (a)—(k), inclusive, of the State Act. This is the section of the State Act corresponding to Section 8 of the Federal Act.

Under the principals of the National Labor Relations Act, the individual appellants retain their status as employees for all of the purposes of collective bargaining.

Thus in this case, the entire scheme of the Wisconsin Employment Peace Act as a system of regulations of collective bargaining comes squarely into conflict with the system of regulations of collective bargaining established by valid Federal law.

7) The Federal Question Involved is Substantial.

The question in this case is whether the State of Wisconsin may enforce a statute purporting to regulate collective bargaining relationships affecting interstate commerce, which in its terms and provisions, on its face, and as construed and applied in this case, is in conflict with and repugnant to the National Labor Relations Act.

The applicable principles of law which demonstrates that there is a substantial Federal question involved in this case are clear and well-established.

1) The National Labor Relations Act is a valid exercise of the constitutional power of Congress to regulate commerce between the States. *N. L. R. B.* v. *Jones & Laughlin*, 301 U. S. 1; *Phelps-Dodge Corp.* v. *N. L. R. B.*, 61 Sup. Ct. 845.

2) The basic purposes of the National Labor Relations Act are to protect the fundamental rights of employees to self organization, to collective bargaining and to other concerted action for their mutual aid and protection against discrimination and interference by the employer. *N. L. R. B.* v. *Jones & Laughlin, supra; Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *Phelps-Dodge Corp.* v. *N. L. R. B. supra; Mackay Radio & Tel. Co.* v. *N. L. R. B.*, 304 U. S. 333.

3) Under the National Labor Relations Act, employees who may commit unlawful acts of minor disorders in the course of a strike cannot be deprived of their fundamental rights as employees and of the statutory protection afforded to these rights by the Federal Act. *Republic Steel Corp.* v. *N. L. R. B.*, 107 F. (2d) 472, cert. den. 309 U. S. 684, affg. 9 N. L. R. B. 219, except for modifications in other respects, 61 Sup. Ct. 77; *N. L. R. B.* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, cert. den. 308 U. S. 605; *Southern Steamship Corp.* v. *N. L. R. B.*, 3d Circ. decided May 6, 1941, 8 Labor Relations Reporter 394; *Carlisle Lumber Co.* v. *N. L. R. B.*, 99 F. (2d) 533.

The rule and its justification was succinctly stated in the opinion in the Republic Steel case, where the Court said: (107 F. (2d) at p. —).

> "In the Fansteel case the Court was dealing with a case which involved a sit-down strike in which the strikers forcibly and unlawfully deprived their employer of possession of his plant. The Court made it clear that unlawful conduct of that character deprived the participant of the right of reinstatement. We think it must be conceded, however, that some disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory. We accordingly recently held that it was not intended by the Act that minor dis-

orders of this nature should deprive a striker of the possibility of reinstatement. National Labor Relations Board *v.* Stackpole Carbon Co., supra."

4) It has long been settled that where there is a conflict between a statute enacted by Congress pursuant to its delegated powers, as for example, the regulation of interstate commerce, and a law adopted by a State in the exercise of its police power, then the Federal statute must prevail. *Gibbons* v. *Ogden,* 9 Wheat. 7; *Southern Railway Co.* v. *Reid,* 222 U. S. 424; *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 222-224; *Hines* v. *Davidowitz,* 61 Sup. Ct. 399; *Reuping Leather Co.* v. *Wisconsin Labor Relations Board,* 228 Wisc. 415, — N. W. —; *Davega City Radio Inc.* v. *New York Labor Relations Board,* 281 N. Y. 13, 22 N. E. (2d) 145.

In the *Consolidated Edison Company* case this Court said, speaking of the New York State Labor Relations Act:

> "It is manifest that the enactment of this State law could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority."

That there is a conflict between the Wisconsin Labor Relations Act and the National Labor Relations Act is evident from the summary of the case recited above. The Wisconsin Act on its face purports to override the labor policy of the Federal government, and to detract therefrom. Section 110.02 (3) (b) of the Wisconsin Act provides that a striking employee who commits unlawful acts of minor disorder loses his position as an employee and thereby is denied the protection of the Wisconsin Act and the employer is free to discharge him for union affiliations or activities. The authority of the State of Wisconsin has thus been exercised to authorize and permit the very thing which Congress in the exercise of its constitutional powers, has prohibited as contrary to the public policy of the United States.

As construed and applied to the individual appellants and their union co-appellant, the Wisconsin Act, through the final order of the Wisconsin Board, upheld in full by the Wisconsin Supreme Court, denies the strikers of their status as employees for such purposes and authorizes and permits their employer to discriminate with impunity against them on account of their union affiliations and activity.

The appellants contend:

a) That the Federal Congress has pre-empted the field covered by the National Labor Relations Act and the Wisconsin Act, purporting to deal with precise subject matters of the Federal Act, is altogether void and of no effect.

b) That, even if the State of Wisconsin had the power to enact a labor relations act dealing with the same subject matter as the Federal Act, then the Wisconsin Act on its face and as construed and applied to the appellant, is so inconsistent with the Federal Act, that the two acts cannot stand together, and the State Act must be deemed altogether void and of no effect.

This is not a case where the State Act merely prohibits and punishes unlawful acts against the peace and order of the State committed by individuals in the course of a labor dispute. There is no issue as to the existence of such powers in the State. But the appellants submit that this is a case where the State is seeking to do more than prohibit such unlawful acts. The Wisconsin Employment Peace Act is a regulation of collective bargaining and labor relations, as fully as is the National Labor Relations Act. Under this State statute, Wisconsin has authorized the very things which Congress has prohibited.

The appellants respectfully submit that there is a substantial Federal question involved herein: This Court must

determine whether, under the circumstances of this particular case, the Wisconsin Employment Peace Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress expressed in the National Labor Relations Act.

Conclusion.

Wherefore, it is respectfully submitted that the appellants in the above-entitled cause, come properly within the jurisdiction of this Court.

Lee Pressman,
Joseph Kovner,
Anthony Wayne Smith,
Attorneys for Appellants.

Of Counsel:
Max E. Geline.

EXHIBIT "A".

Opinion of the Circuit Court of Milwaukee County, State of Wisconsin, Dated December 14th, 1939, Affirming and Enforcing the Interlocutory Order of the Wisconsin Employment Relations Board.

This is an action commenced on July 27, 1939, under Chapter 57, Laws of 1939 (known as the Employment Peace Act), by petitioner, Wisconsin Employment Relations Board against Allen-Bradley Local 1111, Wisconsin Electrical & Radio Workers of America, respondent, for the purpose of enforcing an order of the plaintiff Board.

Hearings were duly had in July, 1939, and the Board on July 13, 1939, made and filed certain interlocutory findings of fact, conclusions of law and the following order:

"1. Cease and desist from:

a. Engaging in mass picketing at or near the plant of the Company and particularly shall refrain from such picketing on the street surrounding said plant, to-wit: Greenfield Avenue, Madison Street, South First Street, and South Second Street;

b. Threatening employees of the Company with physical injury, property damage, or otherwise;

c. Obstructing and interfering with the entrance to and egress from the factory of the Company;

d. Obstructing and interfering with the free and uninterrupted use of the streets and public roads and sidewalks surrounding the factory of the Company;

e. Picketing the domicile of any employee of the Company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

a. The Union may maintain a picket line at or near the premises of the Company, but shall not allow more than fifteen (15) persons to be on such picket line at any one

time of the day. Of such fifteen persons, not more than six (6) shall be on any one of the streets surrounding the plant of the Company at any one time. The pickets are not to obstruct or in any way interfere with entrance to or egress from the plant of the Company. They are not to obstruct or interfere with the free and uninterrupted use of the streets, sidewalks or public roads surrounding the factory of the Company. They are not to in any manner threaten employees or customers of the Company. They are not to endeavor to prevent any one from entering the factory of the Company, and they are not to jeer at, revile, or call any one entering the plant vulgar or offensive names. Such pickets are to be maintained solely for the purpose of notifying the public, employees and prospective employees, that a strike is in progress, and are limited to a number sufficient, in our opinion, to let a reasonable person know that such strike is in progress.

b. Post immediately notices to their members in conspicuous places at the Union strike headquarters, the Union meeting hall, and on each street corner around the Company's factory stating:

1. That the Union will cease and desist in the manner aforesaid;

2. That all picketing is to be carried on as aforesaid;

3. That such notices remain posted for a period of at least thirty (30) days from the date of posting.

c. Notify the Board in writing within ten (10) days from the date of the receipt of this Order what steps the Union has taken to comply therewith."

Several days before this action for the enforcement of the Board's order came on for hearing in this court the strike was terminated. An answer was thereupon filed on behalf of the respondent alleging that the strike had been terminated. It is therefore contended that the controversy had become moot by reason of the cessation of the strike and that, therefore, the prayer of the petition should be denied.

No serious challenge is made by respondent to the findings upon the ground that there is no evidence to support them. The findings of the Board must, therefore, be deemed to be conclusive upon this Court. Section 111.07 (7) provides that:

"Findings of Fact made by the Board if supported by credible and competent evidence in the record, shall be conclusive."

The general doctrine applied to cases involving private litigants that a settlement renders the controversy moot does not apply to cases involving lawful orders of public administrative boards. The decision of the United States Supreme Court in National Labor Relations Board *v.* Pennsylvania Greyhound Lines, 303 U. S. 261, is adverse to respondent's contention upon that point. This case involved an order of the National Labor Relations Board ordering an employer to cease and desist from recognizing a company union as a bargaining agent for employees. At the trial it was claimed on behalf of the employer that the controversy had been rendered moot by its withdrawing recognition from the union and certifying a non-company union as the bargaining agent. In declaring the controversy had not been rendered moot, the Court said:

"Respondents suggest that the case has become moot by reason of the fact that since the Board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania Company for purposes of collective bargaining and that in a pending proceeding under section 9 (c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania Company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

The same doctrine was recognized in N. L. R. B. *v.* Pure Oil Company (C. C. A. 5th, 1939), 103 Fed. (2d) 497. The Court said:

"We do not think the controversy with which the order deals has become moot. The respondent is required to desist from dominating the Refinery Workers' Union of the Smith's Bluff Refinery, or any other labor organization of its employees. While it is true that the Smith's Bluff Refinery has been disbanded, it may be reorganized, or a similar organization formed under another name, with the same employees. The act does not permit an evasion of this kind, and the order under consideration is formed and phrased to prevent it. If it be conceded that respondent has taken the affirmative action required of it, there are certain desist-provisions of the order which operate entirely prospectively."

Respondent relies upon the case of Leader *v.* Apex Hosiery Company, 302 U. S. 656. The controversy there involved was regarded by the Court as a private controversy and did not involve the lawful order of a public administrative board and can readily be distinguished upon that ground. By the weight of authority it must be held that in the situation here presented the controversy did not become moot by the cessation of the strike. Other cases supporting that conclusion are:

N. L. R. B. *v.* Oregon Worsted Co., 96 Fed. (2d) 193 (1938);
Consolidated Edison Co. *v.* N. L. R. B., U. S. —, 83 L. ed. 131, 141, decided December 5, 1938;
Fed. Trade Comm. *v.* Goodyear Tire & Rubber Co., 304 U. S. 254;
U. S. *v.* Freight Assn., 166 U. S. 290;
Southern Pacific Co. *v.* Int. Commerce Comm., 219 U. S. 498;
Sears Roebuck Co. *v.* Federal Trade Comm., 258 Fed. 307, 6 A. L. R. 658.

It appears to be well settled by the weight of authority that where the controversy involves the lawful order of an

administrative board, it does not become moot under circumstances similar to those disclosed in this case. It must be held, therefore, that the controversy was not rendered moot by the termination of the strike before the hearing upon the petition for the enforcement of the order of the Board.

Section 111.06 defines unfair labor practices on the part of the employer, individually or in concert with others.

Section 111.06 (2) defines unfair labor practices on the part of the employee.

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

It is contended by respondent that this provision of the statutes is unconstitutional upon the ground that Congress, by the adoption of the National Labor Relations Act, has pre-empted the field and has thereby deprived the state of its power to legislate on the subject of employer and employee relationship, and upon the further ground that the section of the statutes just referred to is violative of provisions of the United States and the State Constitutions, and that, therefore, the specific order of the Board relating to mass picketing must be held to be invalid.

In approaching the discussion of the constitutionality and the statute and the order of the Board, it must be clearly recognized and borne in mind that a statute should not be declared to be unconstitutional unless it clearly appears to be so beyond reasonable doubt. This rule is well stated in Volume II, American Jurisprudence, p. 718.

"The courts invariably give the most careful consideration to questions involving the interpretation and application of the Constitution and approach constitutional questions with great deliberation, exercising their power in this

respect with the greatest possible caution and even reluctance; and they should never declare a statute void unless its invalidity, is in their judgment, beyond reasonable doubt.

In all instances where the court exercises its power to invalidate, the conflict of the statute with the Constitution must be irreconcilable, * * *; to doubt the constitutionality of a law is to resolve the doubt in favor of its validity. (p. 766, et seq.) The general principle has been expressed in many different forms. It has been declared that in no doubtful case should the courts pronounce legislation to be contrary to the Constitution; that to doubt the constitutionality of a law is to resolve all or every doubt in favor of its validity; * * * and that the court will resolve every reasonable doubt in favor of the validity of the enactment. It has been said that every intendment is in favor of its validity, that it must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears or is made to appear beyond a reasonable doubt; and that it is only where its invalidity is made to appear clearly, plainly, palpably and by irrefragable evidence, where the case is so clear as to be free from doubt, or the act is manifestly in contravention of the Constitution, and where all in all invalidity is disclosed in such a manner as to leave no reasonable doubt, that the courts will declare it unconstitutional. Every reasonable and rational presumption must first be indulged in favor of the validity of the act."

Our Supreme Court has recognized and declared this rule in many cases.

Ry. Co. *v.* State, 128 Wis. 553;
Re: Appointment of Revisor, 141 Wis. 592;
State *v.* Frear, 142 Wis. 320;
State *v.* Daniels, 143 Wis. 649;
State *v.* Phelps, 144 Wis. 1;
Borgnes *v.* Falk Co., 147 Wis. 327;
Peterson *v.* Widule, 157 Wis. 641;
State *v.* Donald, 164 Wis. 545;
Outagamie Co. *v.* Zuelke, 175 Wis. 253;
State *v.* Emery, 178 Wis. 147;
Dick *v.* Heisler, 184 Wis. 77;
N. W. L. Ins. Co. *v.* State, 189 Wis. 103;

State *v.* Zimmerman, 191 Wis. 10;
State *v.* Langlade County Creamery Co., 193 Wis. 113;
Cliffs Chem. Co. *v.* Wis. Tax Comm., 193 Wis. 295;
Malionowski *v.* Moss, 196 Wis. 292;
State *v.* Diehl, 198 Wis. 326;
State *v.* Dammann, 209 Wis. 21;
Payne *v.* Racine, 217 Wis. 550;
In re: Estate of Nieman, 230 Wis. 23.

It is claimed that the Wisconsin Act is void and unconstitutional because it attempts to regulate the same subject which is covered by the National Act. The same question was raised and most carefully considered by our Supreme Court in Wisconsin Labor Relations Board *v.* Reuping Leather Company, 228 Wis. 473. The Reuping Leather Company contested the authority of the Wisconsin Board to proceed under the Wisconsin Act on the ground that the Federal Board had sole jurisdiction. In that case the employer insisted that the Wisconsin Labor Relations Act was invalid because Congress had pre-empted the entire field by the passage of the National Labor Relations Act. Our Supreme Court in a very carefully considered opinion by Mr. Justice Wickham held otherwise. The Court said:

"The power of the State of Wisconsin to subject labor relations to regulation is based upon the police power; that of the federal government to deal with the same subject is grounded upon and limited by the commerce clause, and is sustained upon the theory that strikes, boycotts, and other disturbances arising from labor disputes in industries engaged in interstate commerce so proximately obstruct and burden interstate commerce as to bring labor relations in such industries within the power of Congress.

"The state may, therefore, regulate labor relations in the interests of the peace, health, and order of the state, and the federal government may regulate this relationship to the extent that unregulated it tends to obstruct or burden interstate commerce. Obviously, a possibility of conflict between these powers exists only as to the portion of the field with which Congress has competency to deal. In the absence of a federal statute either dealing with or pre-

empting this field, the police power of the state has full operation, provided no undue or discriminatory burdens are put upon interstate commerce."

The Court further said:

"The National Act does not purport to exclude states from the regulation of the field of labor relations.

"Moreover, the regulation of labor relations as contemplated by the new National Act constitutes only one very small segment of employer-employee relations."

It is clearly pointed out in the *Reuping* case that the similarity or conflict between the national and the state laws is not the determining factor. But, that the conflict in actual administration must be held to be controlling. It is not the possibility of conflict, but the actual conflict in administration that is of vital importance, and when such conflict is presented "It will be time enough to attack the problems they present."

It is earnestly contended by respondent that the provision as to mass picketing contained in Section 111.06 (2) (f) is invalid because violative of the constitutional guaranty of free speech and the denial of the right of peaceable assemblage and the equal protection guaranty and that it is unreasonable because it establishes no standard of guilt. The same contention is urged with respect to the provisions of Section 111.06 (2) (a) declaring it is unfair labor practice "for an employee, individually or in concert with others" to picket the domicile of an employee or his family.

As has already been pointed out, section 111.06 (2) (f) is not intended to declare all mass picketing to be unlawful, but it is expressly limited in its application to cases tending "to hinder or prevent * * * the pursuit of any lawful work or employment."

Findings of petitioner contain the general statement that mass picketing under all circumstances is unlawful and cite in support of this general statement "The Government in Labor Disputes", Witte. But a careful reading of the case shows that this statement of the rule should be interpreted to mean that such mass picketing becomes unlawful

when carried out by force or coercion or other unlawful acts. A statement in "Labor and the Government" (Twentieth Century Fund), page 335, may be taken as a fair statement of the more recent decisions on the subject:

"Court decisions on picketing have been confused and contradictory. It is generally conceded that peaceful picketing should be permitted. But when 'peaceful picketing' in a dispute which involves many thousands of workers in a large plant, is interpreted to mean the presence of no more than one or even two or three pickets at each plant entrance, it is obvious that the effectiveness of picketing is seriously limited. Mass picketing, conducted in accordance with the laws forbidding violence, is the only way to reach any considerable proportion of the workers. And unless it is premised that the workers have no right to strike, it follows that they have also the right to make representations to fellow workers still employed or to strike breakers, which shall be not only orderly and lawful, but which shall stand some chance of making out an effective case for the strike."

This statement, in my opinion, is a fair and reasonable statement of the general trend of the decisions. There is a clear and unmistakable tendency to veer away from or greatly broaden the rule laid down by the case of American Steel Foundries *v.* Tri-City Trade Council, 257 U. S. 184. A fair reading and interpretation of the statute involved, seems to me, is in accord with this doctrine. The end sought to be accomplished is prevention and avoidance of unlawful means and the application of force and coercion. A perusal of the dissenting opinion of Mr. Justice Brandeis in Truax *v.* Corrigan, 257 U. S. 312, 42 Supt. Ct. 124, 66 L. ed. 254, 27 A. L. R. 75, 382, 383, clearly shows that section 111.06 (2) (a) (f) is not violative of any right guaranteed by the federal or state constitution. It is concluded that section 111.06 (2) (a) (f) is a valid and constitutional enactment. Other cases upholding the right of legislatures to enact such statutes are:

American Steel Foundries *v.* Tri-City C. T. Council, 257 U. S. 184, 42 Sup. Ct. 72, 661 L. Ed. 179, 27 A. L. R. 360;

Exchange Bakery & Restaurant *v.* Rifkin, 157 N. E. (N. Y.) 130, 133;
Levy *v.* International etc. Union, 158 Atl. (Conn.) 795;
International Ticket Co. *v.* Wendrich, 193 Atl. (N. J.) 808;
Keuffel & Esser *v.* International Assn. of Machinists, 166 Atl. (N. J.) 9, 10-11;
United Chain Theatres *v.* Philadelphia etc. Union, 50 Fed. (2d) (Pa.) 189, 192;
Goldfinger *v.* Feintuch, 11 N. E. (2d) (N. Y.) 910.

Whether this Court, if the matter were presented as an original proposition, would as severely limited the number of pickets at the places of ingress and egress as was done by the order is immaterial to a determination of the matter before this court and is therefore not to be considered. By virtue of section 111.07 (f) (7) "the findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive." This Court, therefore, has no discretion in the matter with respect to the matter of the limitation of the number of pickets, but must enforce the order of the Board as required by the statute where there is credible evidence to support the finding.

In Seen *v.* Tile Layers Protective Union, 301 U. S. 468, at 478, Justice Brandeis reiterates the doctrine by him discussed in the dissenting opinion in Truax *v.* Corrigan. He said:

"The Court may, in the exercise of its power, regulate the methods and means of publicity as well as the use of public streets."

It must, of course, be made to appear that the purpose of the state statutes is sufficient to justify the restriction. It is never justified where the purpose is trivial. This was clearly pointed out by Justice Roberts in the opinion of the Court in the very recent case of Snyder *v.* City of Milwaukee (U. S. Sup. Ct., November 22, 1939). It must be held that the legislative purpose declaring the Employment Peace Act is sufficient to warrant the restriction imposed by sec-

tion 111.07 (a) (2) and (f). It is concluded that the order made on the 13th day of July, 1939, is a valid order.

The order made on the 13th day of July, 1939, must be confirmed.

Dated December 14, 1939.

Otto H. Breidenbach, Circuit Judge.

EXHIBIT "B".

Opinion of Circuit Court of Milwaukee County, Wisconsin, Dated July 16th, 1940, Enforcing the Final Order of the Wisconsin Employment Relations Board.

Petition of Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, and fourteen individuals, named petitioners, to review the final order of the Wisconsin Employment Relations Board, dated February 1, 1940, in proceedings entitled, "Allen-Bradley Company, complainant, against Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, respondent. The Board and respondent, Allen-Bradley Company, have interposed answers to such petition and the Board presents its cross petition for judgment confirming its final order and for its enforcement.

On July 13, 1939, the Board issued an interlocutory order in the proceedings herein involved, and on January 4, 1940, judgment confirming such interlocutory order was entered by this Court. No material differences are discernible in the orders (interlocutory and final) except that the final order names the individual members (herein named as petitioners) and finds that they have been guilty of unfair labor practices. This additional provision of the final order, it is claimed by petitioners, in effect terminates the employee status of such named members and that it is, therefore, in conflict with and repugnant to the National Labor Relations Act, Section 2 (3). The National Labor Relations Act, it is claimed, guarantees the continuance of the employee status and that any provision in any way restricting or curtailing such provision must be held to be in conflict therewith and therefore invalid and unconstitutional.

The provisions of the National Labor Relations Act referred to must be held, in the light of the decisions interpreting the act, to continue the employee status for the purpose of effectuating the clear intent of the act, which is to prevent unfair labor practices on the part of the employer from interfering with the protection afforded the employee under the act. In other words, unless the employee status is preserved, the purpose of the act may be defeated. The accomplishment of the same purpose was evidently sought by the enactment of the following portion of Section 111.02 (3) R. S., which reads as follows:

"The term 'employee' shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practices on the part of an employer."

The portion of this section particularly complained of by petitioners herein is as follows, in defining the term "employee", among other things, this language is used:

"(b) Who has not been found to have committed or been a party to any unfair labor practice."

The intent of the National Labor Relations Act with respect to preserving the employe status and the limitation as to its scope implicit therein are set forth in N. L. R. B. *v.* Fansteel Corp., 306 U. S. 240; N. L. R. B. *v.* Mackay Radio & Telegraph Co., 304 U. S. 333, 347; N. L. R. B. *v.* Jones & Laughlin, 301 U. S. 1, 45, 46; The Public Steel Corp. *v.* N. L. R. B., 107 Fed. (2d) 472; N. L. R. B. *v.* Stackpole Carbon Co., 105 Fed. (2d) 167.

It is clear intent of the National Labor Relations Act to preserve the employ status wherever necessary to effectuate the purposes of the act and for that purpose only.

Furthermore the situation here presented by petition does not involve a case of employer unfair labor practices under the findings of the Board which must be held to be conclusive, as heretofore indicated by the decision in the interlocutory order, so that an actual case of conflict is not presented in any event. As was stated in W. L. R. V. *v.* Fred Reuping Leather Co., 228 Wis. 473, the time to re-

solve the question of the conflict in the administration of the two acts will be when such situation of conflict is presented.

My conclusion is that no case of conflict between the National and State Acts is presented and that Section 111.02 (b), Wisconsin Statutes must be held a valid enactment.

For the reasons already set forth in the decision of the court affirming the interlocutory order and for the further reasons herein stated, the final order of the Wisconsin Employment Relations Board must be confirmed.

Dated July 16, 1940.

Otto H. Breidenbach, Circuit Judge.

EXHIBIT "C".

Opinion of the Supreme Court of the State of Wisconsin.

IN SUPREME COURT, STATE OF WISCONSIN.

August Cal.—1940. January Term—1941.

No. 213.

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, et al., *Appellants*,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD et al., *Respondents*.

Appeal from a Judgment of the Circuit Court for Milwaukee County: Otto H. Breidenbach, Circuit Judge. *Affirmed.*

Labor relations. This action was begun on March 14, 1940, by Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, Fred Wolter, Esther Kusmierek, Esther Greenemeier, Sophie Koscierski, Frances Chandek, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabresa, Edward Okulski, Peter Blazek, Eilif Tomte, Edward Larson and Mike Domeski, plaintiffs,

against Wisconsin Employment Relations Board and Allen-Bradley Company, a Wisconsin corporation, defendants, to review an order of the Wisconsin Employment Relations Board, dated February 1, 1940, the Allen-Bradley Company employer. The Wisconsin Employment Relations Board, hereinafter referred to as the Board, answered the petition and filed a cross-petition praying that the order sought to be reviewed should be enforced as provided by law. The Allen-Bradley Company answered the petition and concurred in the prayer that the order sought to be set aside should be enforced. There was a trial and judgment of the circuit court was entered on September 3, 1940, from which the plaintiffs appeal.

The Allen-Bradley Company is engaged in the business of manufacturing in the City of Milwaukee and it was stipulated by the parties that the Company is subject to the National Labor Relations Act. The Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, is a labor organization composed of the employees of the Allen-Bradley Company working in the city of Milwaukee.

Prior to the 1st day of May, 1939, there had been in force a contract between the company and the Union governing the terms and conditions of employment which contract was cancelled by the Union, cancellation to take effect as of the 30th day of April, 1939. On May 10, 1939, the Union by a secret ballot ordered a strike, pursuant to which a strike was called by the Union. After the strike was called on May 11, 1939, the Company continued to operate its plant for the duration of the strike which lasted about three months. Differences arose between the striking employes and the Company and those who continued to serve it. The Company thereupon filed a petition with the Board on July 27, 1939, charging the Union and certain of its officers and members with unfair labor practices. Notice of hearing was served which hearing was to be held on June 19, 1939. The Union answered, objecting to the jurisdiction of the Board, claiming that the matters in controversy were solely and exclusively within the jurisdiction of the National Labor Relations Board. It was then answered generally reserving its objection to the jurisdiction. Hearing was

had before the Board in which testimony was taken, and on the first day of February, 1940, the Board made its final order. The findings of fact made by the Board upon which its final order is based are not attacked on this appeal. Briefly, from the findings the following facts appear:

(a) Appellants engaged in mass picketing at all entrances to the premises of the Company for the purpose of hindering and preventing the pursuit of lawful work and employment by employees who desired to work.

(b) They obstructed and interfered with the entrance to and egress from the factory and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory.

(c) They threatened bodily injury and property damage to many of the employees who desired to continue their employment.

(d) They required of persons desiring to enter the factory, to first obtain passes from the Union. Persons holding such passes were admitted without interference.

(e) They picketed the homes of employees who continued in the employment of the company.

(f) That the Union by its officers and many of its members injured the persons and property of employees who desired to continue their employment.

(g) That the fourteen individual appellants who were striking employees, had engaged in various acts of misconduct. The facts relating to those were found specifically. The acts consisted of intimidating and preventing employees from pursuing their work by threats, coercion, and assault; by damaging property of employees who continued to work; and as to one of them by carrying concrete rocks which he intended to use to intimidate employees who desired to work.

Based upon these findings the Board found as conclusions of law, that the Union was guilty of unfair labor practices in the following respects:

(a) Mass picketing for the purpose of hindering and preventing the pursuit of lawful work.

(b) Threatening employees desiring to work with bodily injury and injury to their property.

(c) Obstructing and interfering with entrance to and egress from the factory.

(d) Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory.

(e) Picketing the homes of employees.

As to the fourteen individual appellants, the Board concluded that each of them was guilty of unfair labor practices by reason of threats, assaults and other misdemeanors committed by them as set out in the findings of fact.

Based upon its findings of fact and conclusions of law the Board ordered that the Union, its officers, agents and members

(1) Cease and desist from:

(a) Mass picketing.

(b) Threatening employees.

(c) Obstructing or interfering with the factory entrances.

(d) Obstructing or interfering with the free use of public streets, roads and sidewalks.

(e) Picketing the domiciles of employees.

The order required the union to post notices at its headquarters that it had ceased and desisted in the manner aforesaid and to notify the Board in writing of steps taken to comply with the order.

As to the fourteen individual appellants, the order made no determination based upon the finding that they were individually guilty of unfair labor practices.

As already stated, the controversy was brought before the circuit court on a petition to review. After hearing and argument in the circuit court, judgment was entered September 3, 1940, sustaining confirming and enforcing the order of the Board, from which judgment plaintiffs appeal.

ROSENBERRY, *C. J.*:

Upon this appeal no question is raised as to the constitutionality of the Wisconsin Labor Relations Act, pursuant to which the proceeding under consideration was had, except that it is in conflict with the National Labor Relations Act. Stated in the language of the brief, the appellants contend

"That the Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce."

Appellants further contend that the finding of the Board that the fourteen strikers were guilty of unfair labor practices, is unconstitutional because it is so in conflict with regulations of that National Act governing the employe status of the fourteen strikers that the employe sections of the two acts cannot consistently stand together. While appellant uses the term "unconstitutional", their argument is that the state law can have no application to a manufacturer subject to the National Labor Relations Act because the jurisdiction of the National Labor Relations Act has preempted the field of labor relations in cases where the employer is carrying on an industry in interstate commerce.

We enter upon an examination of the contentions of the plaintiffs and the arguments made in support thereof fully aware that we are dealing with one of the most difficult as well as delicate questions presented to the courts of this country, to-wit: the delimitation of the power of the state and the federal government over a matter which is subject to some extent to their concurrent jurisdiction. The line of demarcation between the federal and state power is not a straight line. It is not only irregular but it is subject to change. The extent of state jurisdiction in some fields depends upon whether the field has been occupied by federal authority. Areas not thought to be within the scope of

federal power originally may be brought within it by economic and social changes. Neither the state nor the federal constitutions change but the subject matter to which they are applied changes and so a new and different result is reached by the application of constitutional principles. See *Home Bldg. & Loan Assn.* v. *Blaisdell* (1933), 290 U. S. 398, 88 A. L. R. 1519. Note, Government powers in peace-time emergencies.

Yet "the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *Labor Board* v. *Jones & Laughlin* (1936), 301 U. S. 1, 30.

We shall first consider the purpose and scope of the National Labor Relations Act for the reason that wherever it applies, it excludes state action from the occupied field. Upon this proposition there is no disagreement. We shall also endeavor to determine when and under what circumstances it applies in a particular case.

While appellants recognize the fact that the National Labor Relations Act was enacted to remove burdens and prevent obstruction to the free flow of interstate commerce, they continually assert that the act confers substantive rights upon individual workers and the unions into which they are organized. Upon the basis of this proposition they argue that if there is any difference in the provisions of the two acts as to what are unfair labor practices or the remedies which may be applied by the boards, there is a necessary and fatal repugnancy between the acts.

The Supreme Court of the United States in *Labor Board v. Jones & Laughlin, supra,* speaking of interstate commerce said:

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. (p. 37)

"The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements *which the act in itself does not* attempt to compel.* * * * The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." (pp. 45, 46)

It is manifest from these and other declarations of the United States Supreme Court in the consideration of the provisions of the National Labor Relations Act that the federal government can proceed only so far with the regulation of labor relations as is necessary to protect interstate commerce, remove burdens from it and prevent obstructions to it. The more study one gives to the National Labor Relations Act, the more he is moved to admire the consummate skill with which it was drafted for the declared purpose of regulating and protecting interstate commerce and yet at the same time leaving the field of proper state action unrestricted so far as possible. A reading of the cases which have arisen in the course of the administration of the act, lead one to the conclusion that such defects as exist are defects of administration rather than defects in the law itself. The conduct of employees, although not denominated "unfair labor practices" by the act, is considered important in determining the character of the employers' acts by the National Labor Relations Board as well as the courts.

In the declaration of policy contained in the National Labor Relations Act, it is said:

"It is hereby declared to be the policy of the United States *to eliminate the causes of certain substantial obstruc-*

---

* Here and throughout the opinion italics are by the writer.

tions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.''

By the National Labor Relations Act the Board is given two principal functions: the first is defined by sec. 9, which as enacted, is headed "Representatives and elections"; the second is defined by sec. 10, which as enacted, is headed "Prevention of unfair labor practices". In Sec. 9 the Board is empowered after appropriate investigation and hearing to certify the name or names of representatives for collective bargaining of an appropriate unit of employees. By sec. 10 the Board is authorized to prevent by order, after hearing, and by a further appropriate proceeding in court, unfair labor practices as defined in sec. 8 of the act. The power of the Board to certify under sec. 9 the name or names of representatives for collective bargaining is not involved in this proceeding. It is apparent, however, from a consideration of the provisions of sec. 9 that the right to determine and certify the name or names of a person or persons who shall represent an appropriate unit of employees for the purpose of collective bargaining, is vested exclusively in the board.

In *A. F. of L.* v. *Labor Bld.* (1940), 308 U. S. 401, the United States Supreme Court had before it for determination the question whether a certification made by the Board pursuant to the provisions of sec. 9 was subject to review by the Circuit Court of Appeals of the proper circuit. The Court held:

"The conclusions is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in sec. 9 (d). (Upon a petition for the enforcement or review of an order under sec. 10 (c), an order made pursuant to sec. 9 (c) may be reviewed.)"

By sec. 10 (a) it is provided that

"The Board is empowered, as hereinafter provided, to prevent any persons from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.*"

By sec. 10 (b) it is provided that whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board or any agent or agency designated by the board for such purpose, *shall have power to issue and cause to be served upon such person its complaint, stating the charges, etc.*

By sec. 10 (c), it is provided:

"If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

Under the provisions of the act, the power to forbid unfair labor practices and to require reinstatement of employees is vested exclusively in the Board and this power may not be affected by any other means of adjustment or prevention. It seems clear from these provisions that the right sought to be vindicated is the right to have interstate commerce free from burdens and obstructions. This is apparent not only from the language of the act but from the decision of the United States Supreme Court in *Amalgamated Utility Workers* v. *Consolidated Edison Co.* (1940), 309 U. S. 261, 84 L. ed. 493. In that case, the union which had been a party to a labor dispute sought to have the Consolidated Edison Company and its affiliated companies adjudged in contempt for failure to comply with certain requirements of the decree made in the case to which it was a party. The Court of Appeals denied the application on the ground that "petitioner had 'no standing to press a charge of civil contempt, if contempt had been committed.' "

The Supreme Court of the United States cited excerpts from the committee reports of both houses of Congress and said:

"We think that the provisions of the National Labor Relations Act conferring exclusive power upon the board to prevent any unfair labor practice, as defined, a power not affected by any other means 'of prevention that has been or may be established by agreement, code, or law, or otherwise,' necessarily embraces exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. *It is the Board's order on behalf of the public that the court enforces.* It is the Board's right to make that order that the court sustains. *The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy.'* Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention."

The Court affirmed the decision of the Circuit Court of Appeals. See also *Fur Workers Union Local No. 72* v. *Fur Workers Unions*, 105 F. (2d) 1.

It is obvious that the purpose of the National Labor Relations Act is to promote the free flow of interstate commerce by the prevention of unfair labor practices as defined in the act. The regulation of interstate commerce is the constitutional basis of the power of Congress over labor relations. Prior to the adoption of the National Labor Relations Act and the decision of the United States Supreme Court sustaining it, many persons supposed labor relations to be a subject reserved to the states by the Tenth Amendment to the Constitution of the United States and that it was beyond the competency of Congress to deal with the subject. No doubt it is because of that fact that the act so meticulously delimits the power and authority of the Labor Board to matters which substantially affect interstate commerce, that being a subject over which Congress has, when it is exercised, exclusive jurisdiction. Hence Congress does not seek in the National Labor Relations Act to deal with

labor relations generally. It deals with labor relations only so far as in its opinion it is necessary to protect interstate commerce from being impeded or obstructed by unfair labor practices on the part of employers.

The act prescribes a procedure for the protection and enforcement of the right of employees for self-organization, to bargain collectively, and to engage in collective activities as enumerated in Sec. 7 for the purpose of protecting interstate commerce and to that end it confers large discretionary power upon the National Labor Relations Board. The rights enumerated in sec. 7 were in existence before the act was passed. If the act were to be repealed these rights would still exist. No one would more promptly assert that fact than the representatives of labor.

In *Amalgamated Util. W'rk's.* v. *Consol. Edison Co., supra,* the Supreme Court of the United States, referring to sec. 7 of the Act, said.

"Neither this provision, nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In National Labor Relations Bd. v. Jones & L. Steel Corp., 301 U. S. 1, 33, 34, 81 L. ed. 893, 909, 910, 57 S. Ct. 615, 108 ALR 1352, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents'; that discrimination and coercion 'to prevent the free exercise of the right of employees to self-organization and representation' was a proper subject for condemnation by competent legislative authority. We noted that 'long ago' we had stated the reason for labor organization,—that through united action employees might have 'opportunity to deal on an equality with their employer,' referring to what we had said in American Steel Foundries v. Tri-City Central Council, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 A. L. R. 360. And in recognition of this right, we concluded that Congress could safeguard it in the interest of interstate commerce and seek to make appropriate collective action 'an instrument of peace rather

than of strife.' To that end Congress enacted the National Labor Relations Act."

In determining whether the Employment Peace Act is repugnant to the provisions of the National Labor Relations Act, it is of little moment whether we say that the National Act confers rights and privileges upon employees or organizations of employees, or how we describe its effect upon employees. Both from the language of the act and the construction which has been placed upon it by the United States Supreme Court, it is apparent that the act operates effectively in a particular case only in the way and to the extent which is determined by the orders of the National Labor Relations Board. If an employer indulges in any of the unfair labor practices described in sec. 8 of the act, the sole redress of the employees is to charge the employer with such unfair labor practices before the Board. When such a charge is made, the Board may or may not in its discretion decide to take jurisdiction of the controversy. Its determination will depend upon whether it finds the situation is such as to substantially affect interstate commerce. When it acts, the order of the Board determines the manner in which and the extent to which the act shall be effectively applied to the particular situation being dealt with. If the determination of the Board together with the force of public opinion is not sufficiently persuasive to bring about compliance with the Board's order, the Board may then apply to the proper circuit court of appeals for enforcement of the order. In this respect it differs materially from the transportation act of 1920, ch. 91, 41 Stat. 456. Under that act "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding." *Labor Board* Case, 261 U. S. 72, 79. See *Penna. Brotherhood* v. *P. R. R. Co.*, 267 U. S. 219.

The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts but is one of jurisdiction between the state and federal gov-

ernments. Inasmuch as the National Labor Relations Act depends for its effective operation upon the determination of the National Labor Relations Board, there can be no conflict between the acts until they are applied to the same labor dispute. They are upon two different planes. That National Labor Relations Act deals with labor relations only as a means of protecting interstate commerce. The Employment Peace Act deals with labor relations in the exercise of the police power of the state. To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding.

In this case the employer has never been charged with an unfair labor practice nor has the National Labor Relations Board ever been requested to determine who is the proper bargaining representative. Consequently the National Labor Relations Act has never been applied to the labor dispute here under consideration and it may never be applied, depending upon the exercise of the discretion of the National Labor Relations Board. Therefore, there can be no conflict of jurisdiction between State and Federal authority in this case. This conclusion does not depend upon the language of the two acts. If the language of the Employment Peace Act was identical with that of the National Labor Relations Act and in a particular case the National Labor Relations Board took jurisdiction, the jurisdiction of the Wisconsin Employment Labor Relations Board would be ousted notwithstanding the identity in language of the two acts and the determination made by the National Labor Relations Board would be controlling. The action of Congress leaves to the State full authority to deal with labor relations generally. Congress exercises its power in the interest of interstate commerce. With that subject the State has nothing to do. Its power to regulate —the power to promote the peace, morals, health, good

order and general welfare of the people as a whole. It may not, however, in the exercise of that power encroach upon the Federal domain.

The appellants, while asserting that they do not do so, in fact argue this case as if the failure of Congress to define unfair labor practices of employees operates as a license to employees in the enforcement of their demands to do any or all of the things declared by the Employment Peace Act to be unfair labor practices. This argument stems from the idea that Congress is regulating labor relations instead of interstate commerce. In *National Labor Relations Bd.* v. *Fansteel Metallurgical Corp.* (1939), 306 U. S. 240, 256, the Supreme Court of the United States said:

"Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the union committee 'to take over and hold two of the respondent's key buildings.' It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of the 'right to strike' to which the act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. *When the employees resorted to that sort of compulsion they took a position outside of the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve* • • •

"We repeat that the fundamental policy of the act is to safeguard the rights of the self-organization and collective bargaining and thus, by the promotion of industrial peace, to remove obstructions to the free flow of commerce as defined in the act. *There is not a line in the statute to warrant the conclusions that it is any part of the policies of the act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees rights.*

It is considered that this determination by the Supreme Court of the United States disposes of the contention made.

One of the principal contentions of appellants here is that fourteen strikers who were found guilty of unfair labor practices (acts of violence and coercion) are, under the terms of the National Labor Relations Act, still employees of the Allen-Bradley Company; that because of the finding of the Wisconsin Employment Relations Board that the employees were guilty of an unfair labor practice, that relationship is severed, consequently there must be a conflict between state and federal authority. There are two answers to this contention, first, the National Labor Relations Act has never been applied to the labor dispute here under consideration; second, a mere finding of the Wisconsin Employment Relations Board does not affect the employer and employe relationship. Appellants' contention is based upon sec. 111.02 (3) of the Wisconsin Employment Peace Act. That part which is material is as follows:

"The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual * * * (b) who has not been found to have committee or to have been a party to any unfair labor practice hereunder."

Considering the language of this section by itself, it may warrant the interpretation put upon it by appellants, that is, that a mere finding is sufficient to deprive the employee of his status. However, when considered in connection with other provisions of the act, we think it cannot be so interpreted. That part of sec. 111.07 (4), which is material here, is as follows:

"Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including the

reinstatement of the employees with or without *pay, as th Board may deem proper.*"

The continuation of the status of an employee is ce tainly a right or privilege. The act specifically provide how it shall be terminated, that is, by order of the Boar Sec. 111.07 (8), stats., provides:

"Within thirty days from the date of the order of th board as a body, any party aggrieved thereby may petitio the circuit court for the county in which he or any part resides or transacts business, *for review of the same.*"

No provision is made for reviewing the findings. Unde sec. 111.07 (7 & 8), Employment Peace Act, the Court ha power only "to confirm, modify or set aside the order o the Board and enter an appropriate decree." It examine the record to ascertain whether the findings are supporte by the evidence. Its judgment may operate only upon th provisions of the order. It is considered, in view of th large discretionary power committee to the Board, that th act affects the rights of parties to a controversy pendin before the Board only in the manner and to the extent pre scribed by the order. As pointed out in *Hotel & Restaura Employees Assn., Local 122, et al.* v. *Wisconsin Employ ment Relations Bd., et al.*, Wis. — N. W. — the jurisdictio of the Wisconsin Board over labor disputes is to som extent concurrent, it being provided in sec. 111.07 (1 Stats.:

"But nothing herein shall prevent the pursuit of legal o equitable relief in courts of competent jurisdiction • • •

(4) "Final orders may dismiss the charges," etc.

As already stated, the manner and the extent to which th act shall apply in a particular case pending before it i committed to the discretion of the Board. Its command are found in the order, which determines the status an obligations of all parties to the controversy, not in the find ings. In the Board's order under review, there is no pro vision which suspends the status as employees of the four teen individual appellants found guilty of unfair labo practices. In this case for the reasons stated there is n conflict in regard to employe status.

In response to the argument made by appellants there is a conflict between the two acts because of the difference in definitions, we point out that these definitions apply only for the purposes of the act in which they are found. In sec. 2 of the National Labor Relations Act certain terms used in the act are defined. That section begins "When used in this act," the various terms defined mean thus and so. Definitions of terms in the Employment Peace Act are found in sec. 111.02. That section begins: "When used in this chapter," the term defined includes or means thus and so. In controversies in which the National Labor Relations Board takes jurisdiction, it will in the course of its determination apply the definitions contained in the National Labor Relations Act. When the Wisconsin Employment Relations Board takes jurisdiction of a labor dispute it will apply the definitions contained in the Employment Peace Act in formulating its determinations. Conflict between the two acts can arise only with respect to orders issued by each of the Boards dealing with the same situation. No matter how arrived at by the boards there can be no conflict if there is none in the order dealing with the same labor dispute. For the reason stated we discover no conflict in the two acts on account of the difference of definitions of the terms to be found in them.

When appellants concede that the state may punish unlawful acts of strikers who are engaged in striking because of unfair labor practices of their employer, they concede the power of the state to deal with some aspects of every labor dispute. In the case of the National Labor Relations Act the jurisdiction of the federal authority is not aroused until such a situation has arisen that interstate commerce is impeded or obstructed. On the other hand, state action is regulatory in its nature and is designed to bring about industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services for the promotion of the general welfare. The federal act deals with a situation that has arisen. The state act seeks to forestall action which may lead to disorder and loss of life and property.

Appellants specified nine ways in which the state and federal acts conflict but as already pointed out, these con-

flicts do not exist until the National Labor Relations Act is applied by the National Labor Relations Board in a particular case. As has already been pointed out state power is not destroyed by federal action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by the National Labor Relations Act. Its power is suspended so far as is necessary to give effect to that act.

We might have disposed of this case when we reached the conclusion that the Federal Act not having been invoked with respect to the labor dispute here under consideration there can be no conflict between the two acts. We have thought it best, however, in the interest of certainty to deal specifically with certain questions raised by appellants. If the National Labor Relations Act is repealed, the power of the state over labor relations will be the same as it was before the act was passed. If the Interstate Commerce Act should be repealed the state's power over interstate commerce would not be enlarged. It might have greater latitude in dealing with intra-state commerce but its jurisdiction would be over intra-state commerce, not over interstate commerce.

We wish to point out again that the court has no jurisdiction or authority to pass upon the policy involved in this or any other act. Questions of public policy are primarily for the legislature. If the provisions of this act are too restrictive, as claimed in the brief, the court may not deal with that feature of the act if it is otherwise within the field of constitutional legislative action. In upholding the law against attacks upon its validity on the ground that it is unconstitutional, the court neither commends nor criticizes the public policy involved. If the act is too restrictive, the remedy lies with the legislature and not with the court.

By the court.—Judgment affirmed.